

§ 778.408 The specified regular rate.

(a) To qualify under section 7(f), the contract must specify “a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable).” The word “regular” describing the rate in this provision is not to be treated as surplusage. To understand the nature of this requirement it is important to consider the past history of this type of agreement in the courts. In both of the two cases before it, the Supreme Court found that the relationship between the hourly rate specified in the contract and the amount guaranteed was such that the employee in a substantial portion of the workweeks of the period examined by the court worked sufficient hours to earn in excess of the guaranteed amount and in those workweeks was paid at the specified hourly rate for the first 40 hours and at time and one-half such rate for hours in excess of 40 (*Walling v. A. H. Belo Company*, 316 U.S. 624, and *Walling v. Halliburton Oil Well Cementing Company*, 331 U.S.17). The fact that section 7(f) requires that a contract, to qualify an employee for exemption under section 7(f), must specify a “regular rate,” indicates that this criterion of these two cases is still important.

(b) The regular rate of pay specified in the contract may not be less than the applicable minimum rate. There is no requirement, however, that the regular rate specified be equal to the regular rate at which the employee was formerly employed before the contract was entered into. The specified regular rate may be any amount (at least the applicable minimum wage) which the parties agree to and which can reasonably be expected to be operative in controlling the employee’s compensation.

(c) The rate specified in the contract must also be a “regular” rate which is operative in determining the total amount of the employee’s compensation. Suppose, for example, that the compensation of an employee is normally made up in part by regular bonuses, commissions, or the like. In the past he has been employed at an hourly rate of \$5 per hour in addition to which he has received a cost-of-living bonus of \$7 a week and a 2-percent commis-

sion on sales which averaged \$70 per week. It is now proposed to employ him under a guaranteed pay contract which specifies a rate of \$5 per hour and guarantees \$200 per week, but he will continue to receive his cost-of-living bonus and commissions in addition to the guaranteed pay. Bonuses and commissions of this type are, of course, included in the “regular rate” as defined in section 7(e). It is also apparent that the \$5 rate specified in the contract is not a “regular rate” under the requirements of section 7(f) since it never controls or determines the total compensation he receives. For this reason, it is not possible to enter into a guaranteed pay agreement of the type permitted under section 7(f) with an employee whose regular weekly earnings are made up in part by the payment of regular bonuses and commissions of this type. This is so because even in weeks in which the employee works sufficient hours to exceed, at his hourly rate, the sum guaranteed, his total compensation is controlled by the bonus and the amount of commissions earned as well as by the hourly rate.

(d) In order to qualify as a “regular rate” under section 7(f) the rate specified in the contract together with the guarantee must be the actual measure of the regular wages which the employee receives. However, the payment of extra compensation, over and above the guaranteed amount, by way of extra premiums for work on holidays, or for extraordinarily excessive work (such as for work in excess of 16 consecutive hours in a day, or for work in excess of 6 consecutive days of work), year-end bonuses and similar payments which are not regularly paid as part of the employee’s usual wages, will not invalidate a contract which otherwise qualifies under section 7(f).

[33 FR 986, Jan. 26, 1968, as amended at 46 FR 7317, Jan. 23, 1981]

§ 778.409 Provision for overtime pay.

The section 7(f) contract must provide for compensation at not less than one and one-half times the specified regular rate for all hours worked in excess of the applicable maximum hours standard for the particular workweek. All excessive hours, not merely those covered by the guarantee, must be